THE BLUNDELL LECTURES

Commonhold : The dawning of a new age?

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In the light of the history of commonhold in this country, it was interesting to note that the leaflets advertising these lectures refer to the *"..proposals set out in the Bill currently before Parliament.."* That Bill, the Commonhold and Leasehold Reform Bill, was one of the casualties of the General Election and, to that extent, of course there are presently no proposals before Parliament to introduce commonhold. However, I have little doubt that fresh proposals will be brought forward in the new Parliament – it was after all a commitment in the Labour Party Manifesto to "….continue to promote housing choice, with reforms to leasehold and commonhold law……..". I think therefore that this is an opportunity to look at the history of commonhold in this country. It is by no means a recent history and as we shall see its origins can be traced back over 35 years or so.

So, what is commonhold? In simple terms, it is a system of land ownership, which allows for the freehold ownership of a part of a building or site and communal ownership of the "common parts", coupled with the ability mutually to enforce, rights and obligations within the building or site through a system of democratic management in the hands of the owners.

The Consultation Paper published with the Commonhold and Leasehold Reform Bill in August 2000 described the nature and creation of a commonhold development in the following terms:-

"Each separate property in the commonhold development will be called a unit. It might be a flat or a house, a shop or a light industrial unit. The owner will be called a unit holder. The body, which will own and manage the common parts and facilities of the development will be called the commonhold association. The commonhold association will be a private company limited by guarantee whose membership will be restricted to all the unit holders within the development. The commonhold association will be registered at Companies House in the usual way and will have a standard set of Memorandum and Articles, which will be prescribed by the Lord Chancellor from time to time. This means that all the unit holders in the development will have two interests in the property of the commonhold; a direct interest in the unit or units that they own and an interest in the commonhold association which owns the common parts."

Why do we need this?

Before 1926 there were many different legal estates and legal interests that could exist in land; and a corresponding range of estates and interests that could exist in equity. However, since 1925 only two legal estates in land can exist and the number of legal interests has been limited. The two legal estates are the *"fee simple absolute in possession*" – in common parlance "*freehold*" and the "*term of years absolute*" –

commonly known as "*leasehold*". Although commonhold will not be a new form of legal estate in land (it will be a type of freehold ownership with particular statutory attributes), it is a new form of communal land ownership.

There are two basic doctrines in the law of real property in England and Wales. These are known as:-

i) The doctrine of tenures: all land is held of the Crown either directly or indirectly on one or other of the various tenures; and
ii) The doctrine of estates: a subject cannot own land but can merely own an estate in it authorising him to hold it for some period of time.

Although freehold is popularly perceived to be "*forever*", that is not strictly correct. If no heirs to the owners of freehold land can be found, then the freehold interest terminates and reverts back to the Crown. Interestingly, the modern freehold estate derives from the feudal tenure of socage, in contrast to the leasehold system, which arose entirely outside the feudal system of tenures. Nevertheless, politicians and others have continued to use the term *"feudal*" when referring to the leasehold system. Indeed, the Labour Party's paper published in October 1995, setting out its then proposals for leasehold reform, was called "*An end to feudalism*". Academic lawyers may be forgiven for thinking that it was the Labour Party's intention to abolish freehold. Nevertheless, for all practical purposes, ownership of the freehold interest in land is considered to be absolute ownership without end.

In contrast, a lease, as it is generally understood today, is a document that creates an interest in land for a fixed period of certain duration, usually in consideration of the payment of rent, generally out of the freehold estate. It gives rise to the relationship of landlord and tenant. The essence of leasehold is that it gives the tenant a right to possession of land for a specific period of time only and, when that time expires, the land reverts back to the freeholder. During the period of the lease, the tenant generally has imposed upon him obligations to the landlord for the management of the land and restrictions on his use of the land.

The problem that arises is that currently neither the freehold nor the leasehold system provides a satisfactory solution to the communal ownership of land. An obvious example is a block of flats, which comprises on the one hand individual units and on the other hand communal areas such as the structure of the building, gardens, roadways etc. Before the Second World War, the idea of selling flats was unusual. Generally, flats were let on tenancies at a market rent. However, the post-war rise in statutory rent control and restrictions on lettings generally, coupled with the rise in the value of residential property, particularly in central urban areas, made it more attractive for the owners of blocks of flats to look at methods of selling a flat outright as a means of realising capital values. It might appear that the most obvious solution to this would be to sell the freehold of a flat but it was quickly perceived that the system of English land law created a problem with this; namely, the ability of one freehold owner to enforce positive obligations against another freehold owner. This is clearly an essential feature of communal ownership. One flat owner must be able to ensure that the other flat owners and the owners of the communal areas comply with their management obligations relating particularly to the maintenance of the building as a whole. The inherent difficulty is that under English law, the burden of positive covenants between adjoining landowners does not in any circumstances run with the land. What that means in practical terms is that the successive freehold owners of

one part of a building cannot enforce obligations against the successive owners of other parts. This has long been perceived as a severe deficiency in the law. Over the years, a number of proposals have been put forward to try to overcome those deficiencies but it is fair to say that none of them work very satisfactorily.

On the back of this deficiency in the law, it soon became apparent that the only effective method for selling flats was the leasehold system. The substantial advantage over the freehold system for this purpose is that obligations between successor landlords and successor tenants are enforceable and in consequence a workable system of communal ownership can be established. This enforceability arises from the doctrine of “privity of estate” under which the burden and the benefit of a covenant run with the interests of the landlord and the tenant. However, although the leasehold system overcomes the problem of enforceability of positive covenants, it has its own problems.

First, a lease by its nature is finite. It grants an interest only for a specified period and, at the end of that period, the land reverts back to the landlord. A common lease length is 99 years and, although that might seem a very long period when the lease is granted, it will eventually come to an end. As the lease term diminishes, so its value and marketability reduces. Furthermore, the ability of the tenant to use his lease as security for a loan becomes much more difficult as the lease term reduces. When the depreciation starts to have a serious impact on an occupying leaseholder, his position becomes an unfortunate one. His home has become a depreciating asset and capital locked up in it starts being whittled away by the passage of time at an increasing rate. If he wishes to continue living there, the only practical and effective way he can preserve its full value is to acquire a longer lease. However, he is entirely at the mercy of the landlord as to whether a longer lease can be granted. It was this difficulty that broadly gave rise to the enfranchisement legislation, originally for houses and subsequently for flats.

The second difficulty is one of management. In the traditional landlord and tenant relationship within a block of flats, the tenant is made responsible for the interior of the flat with the landlord retaining responsibility for the structure of the building and the common parts and recovering the costs of that responsibility from the tenant through a service charge. It cannot be denied that this structure has given rise to abuse by some landlords. Inevitably, the majority of tenants look upon their flats as a home whereas a landlord will tend to see the block as a whole as a financial investment out of which he wants a return. An inefficient or unscrupulous landlord can therefore result in poor quality management, high service charges and difficulties in enforcing management obligations. Also, leases are individually drafted outside any statutory framework. There is no such thing as a standard form of lease and some leases – particularly those granted many years ago – can be deficient. There are cases where landlords have disappeared or are based offshore and in consequence are difficult to contact. Others simply fail to do any management so that the fabric of the block deteriorates. Conversely, other landlords carry out substantial, expensive and unnecessary works (very often through an associated company) in order to make a substantial profit by over-charging on the service charge account.

This abuse of the leasehold system (and it is the abuse rather than the system itself) has fuelled the politicisation of the landlord and tenant relationship. In some ways, it has become almost a microcosm of society. The landlords are perceived to be the wicked, grasping but powerful minority whereas the tenants are seen as the

impoverished, downtrodden and powerless majority. The truth is that there are good and bad landlords and good and bad tenants; the sadness is that the efforts of successive governments to address these issues have largely been driven by political doctrine rather than sensible pragmatism. It is perhaps encouraging that the principle of commonhold has at least tried to rise above this.

So how have the politicians and others addressed these issues? In simple terms, they have looked at different solutions for each of the difficulties. The problem of the wasting asset has been tackled through enfranchisement – the compulsory right for a tenant to acquire a greater interest in his land; either the freehold or a longer lease. The problems of management have been tackled through an increasingly complex code of statutory procedures and regulations coupled with enfranchisement or a right to manage. The difficulty of the enforcement of positive covenants as between neighbouring freehold owners has been looked at in the context of alternative forms of land holdings. I accept that this is a simplification but without question, the approach has been piecemeal and, as we shall see, has been often driven more by short-term political gain than long-term practical solutions.

So, what is the history of the legislation?

So far as the modern law of leasehold enfranchisement is concerned, this can be traced back to 1948, when a Leasehold Committee was appointed to consider (inter alia) leasehold enfranchisement. Interestingly, in its final report[1] presented in June 1950, the majority of the Committee, under the Chairmanship of Jenkins LJ, recommended against any measure of leasehold enfranchisement. However, there was a minority of the Committee that recommended that occupying ground lessees of dwelling houses should have the right of leasehold enfranchisement by compulsory purchase of the fee simple and any intermediate reversion. In February 1966, the then Labour Government produced a White Paper on Leasehold Reform in England and Wales[2] which set out their intention to introduce a Bill to enable a long leaseholder to acquire compulsorily either the freehold or a 50 years extension of his existing lease. It was this White Paper that led to the Leasehold Reform Act 1967. That Act applied only to houses and not to individual flats and maisonettes. The 1966 White Paper gave the reason for this limitation as follows: -

" The system of long leases for flats has arisen only in recent years. Different considerations of equity apply and there would be many practical difficulties in providing for enfranchisement of flats."

It has never been satisfactorily explained what were "*the different considerations of equity*" that the government then had in mind – the cynical explanation for the statement would be that, in the 1960's there was little political demand for enfranchisement of flats and maisonettes – a situation that subsequently changed radically.

In the meantime, the government was also looking at the technical conveyancing difficulties arising from "flying freeholds". In 1965 the Wilberforce Committee Report on Positive Covenants affecting Land[3] was published and made recommendations

[1] Cmd. 7982 (1950)
[2] Cmnd. 2916 (1966)
[3] Cmnd 2719 (1965)

for dealing with the problems of freehold flats. This was followed by the Law Commission's Report on Restrictive Covenants[4] and although a draft Bill was subsequently produced dealing with the substance of those recommendations, it was never introduced.

During the 1970's the government began addressing the issue of the regulation of service charges and introduced legislation to that effect, initially under the Housing Finance Act 1972, extended by the Housing Act 1974, then replaced by the Housing Act 1980 and re-enacted in the Landlord and Tenant Act 1985. This legislation broadly produced a regulatory code for the management of residential buildings and the administration of service charges.

In January 1984 the Law Commission presented a report entitled "*Transfer of Land – the Law of Positive and Restrictive Covenants*".[5] This report recommended the creation of a new interest in land, to be called a "land obligation", which would be capable as subsisting as a legal interest. The proposal was that the land obligation should impose a burden on the owner of one piece of land, either for the benefit of the owner of another piece or as part of a development scheme, in which case the owners of separate properties within the defined area would each have rights and obligations in relation to the others. Some of the people who commented on the land obligation proposals suggested that condominium legislation should also be introduced along the lines of the legislation then operating successfully in Canada and the United States and under the name of strata title in Australia and New Zealand. In consequence a Working Party was set up to consider such legislation and that resulted in the Law Commission's Report on "*Commonhold – freehold flats and freehold ownership of other interdependent buildings*"[6] which was published in July 1987. This proposed a commonhold scheme to operate independently of the proposals for land obligations but to complement them.

Throughout the 1980's there was increasing concern at and widespread complaints of poor management and excessive service charges – particularly in blocks of flats. This led to the publication in 1985 of the Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats (commonly known as the Nugee Report). Its principal recommendations were incorporated in the Landlord and Tenant Act 1987 which provided increased statutory control on the imposition of service charges and the landlord's ability to recover them. However, in order to try to add some muscle to the statutory codes, the 1987 Act also included the first tentative steps towards collective enfranchisement, although the circumstances in which the rights were exercisable were and remain limited. This Act provided that a landlord, who was intending to dispose of his interest in a block of flats, should first offer that interest to the tenants. It also allowed tenants of flats to compulsorily acquire the landlord's interest if the block was sold without first exercising the first refusal or if there were serious breaches by the landlord of his management obligations. The initial drafting was very poor and the Act was generally perceived to be ineffective, despite substantial amendments made by the Housing Act 1996.

[4] Law Com. No.11 (1967)
[5] Law Com. No. 127 (1984)
[6] Cm. 179 (1987)

The government returned to the issue of commonhold by publishing in November 1990 a further Consultation Paper[7]. It repeated what the government saw as the inherent problems of the leasehold system; namely, that the relationship of the freeholder and leaseholder was inevitably biased in favour of the freeholder and that a lease was by its nature a wasting asset. The consultation period on this Report came to an end in March 1991. However by then a General Election was looming. Tenants' pressure groups had waged an extremely effective campaign demanding action. The drafting of detailed commonhold legislation was proving to be very much more difficult then the government had originally anticipated. The government seemed intent on re-inventing the wheel and had remarkably little regard for the detail of similar legislation in other countries. The Members of Parliament then representing the powerful London leaseholder Boroughs of Kensington, Chelsea and Westminster needed a government response.

In July 1991 the Department of the Environment produced its response by publishing a leaflet called "*Enfranchisement of Long Leasehold Flats*". It still emphasised commonhold but now, as part of that scheme, the government proposed to give long leaseholders in a block of flats the right to buy the freehold interest in the building as the first step towards commonhold. It was stated that the proposals were designed to tackle the problems of bad management and to provide a solution to the difficulty of selling diminishing lease terms. Enfranchisement was still seen however as merely a step towards commonhold.

Following a further period of consultation, the then government issued revised proposals in March 1992 and the shift away from commonhold to enfranchisement as the solution to the problem of residential landlord and tenant was complete. Backed by victory in the General Election at which the extension of "tenants' rights" had been a Manifesto commitment, the government stated its intention to introduce collective enfranchisement for flat leaseholders together with lease extensions for those leaseholders that failed to qualify for collective enfranchisement and the extension of enfranchisement rights for leasehold owners of houses.

However, commonhold was not quite dead and, in conjunction with the Housing and Urban Development Bill (later to become the Leasehold Reform, Housing and Urban Development Act 1993), which was, then before Parliament, the Lord Chancellor's Department published a further booklet in 1993 entitled "*Commonhold – the way ahead, communal ownership and management*." A further Consultation Paper and draft Bill followed that in 1996. However despite all party support and (it should be said) general support within the property industry) for the principle of commonhold, parliamentary time could not be found to introduce legislation and the focus reverted once more to enfranchisement.

The Leasehold Reform, Housing and Urban Development Act 1993 extended substantially enfranchisement rights and broadly followed the government's proposals that had been issued the previous year. The legislation was highly controversial with the views of the tenant lobby and landlord lobby becoming violently polarised. Most landlords then still viewed the principle of enfranchisement as *"an infringement of long standing democratic principles*", whereas the tenant lobby was deeply disappointed by amendments made to the legislation as it progressed through Parliament. In my view, the failure of the government properly to address the issue of

[7] Cm. 1345 (1990)

commonhold at this stage and to rely on enfranchisement, did immense damage to the whole debate on the question of residential landlord and tenant and contributed substantially to polarisation of the views of the opposing camps.

The Housing Act 1996 was originally intended simply to deal with a number of anomalies that had arisen in consequence of the extension of enfranchisement rights in 1993. However powerful lobbying and the prospect of another general election resulted in amendments of substance being made to the 1993 Act, which further extended tenants' enfranchisement rights and tightened the service charge code.

In October 1995, the Labour Party had produced its policy document "*An end to feudalism*". It was very much a political document – long on rhetoric and short on detail. However it did highlight some of the genuine areas of concern. It again stressed the need for commonhold, although as a replacement for the leasehold system rather than working in conjunction with it. However, in the context of a political document, the emphasis remained on the extension of enfranchisement rights rather than the introduction of a new form of land tenure.

Following the 1997 General Election, however, the new government started serious work on the preparation of a commonhold Bill. Perhaps for the first time a genuine attempt was made to learn from similar laws in different jurisdictions and there was wide consultation. This resulted in the publication in August 2000 of a further draft Bill and Consultation Paper and finally, at the end of last year, the introduction into the House of Lords of the Commonhold and Leasehold Reform Bill. The Bill attacked the issues on all three fronts. For the first time it introduced commonhold. It also introduced a new right to manage – a right for tenants to take on responsibility for the management of their building whether or not the landlord was in default and without a need for those tenants to acquire any greater interest in the building. It also provided for the further extension of enfranchisement rights. However, as the Bill reached its Report stage in the House of Lords, announcement came of a general election and the Bill was lost. Nevertheless, it is at least encouraging that, some 13 years after the Law Commission's Report recommending the introduction of commonhold and 10 years after the first draft Bill, legislation on the subject has at last been laid before Parliament.

So what do we learn from this history.

The first thing that strikes you is the pure volume of the legislation. It seems that no sooner is one Report published, than another is commissioned; Consultation Paper is followed by Consultation Paper (sometimes, it is hard to believe that they have had time to consider the responses to one paper before the next one is published) and Acts of Parliament follow in a steady stream. Compare that with legislation in the field of commercial property, where a single Act, the Landlord and Tenant Act 1954, has remained largely undisturbed for over 45 years. I have already made the point that residential property is a big political issue and unquestionably elements of this legislation are driven by the political dogma of the main parties. The Leasehold Reform Act 1967 was introduced by a Labour Government – the Conservative Party supported the principle of enfranchisement but opposed the Bill; the Leasehold Reform, Housing and Urban Development Act 1993 was introduced by a Conservative Government – the Labour Party supported the principle of the extension of enfranchisement but opposed the Bill. Equally, the politicians cannot decide whether they want to keep the leasehold system or replace it with something

else. Sometimes, it is apparent that they simply do not understand the issues. For example, the 1992 manifesto of the Conservative Party included the statement that they would "……introduce "Commonhold" legislation, giving residential leaseholders living in blocks of flats the right to acquire the freehold of their block at the market rate"; thereby making it quite clear that they did not understand the difference between commonhold and enfranchisement. The problem is compounded by having much of the legislation ill-thought out and poorly drafted, with many major points being added at the last moment as the Bill passes through its Parliamentary stages. The Landlord and Tenant Act 1987 went through all its Parliamentary stages in the few days before that year's general election to produce a statute which is generally accepted to be one of the peaks of bad drafting. The problem is compounded by the fact that many of those whom it is intended should benefit from this legislation find it difficult to enforce their rights. A court or tribunal can be a frightening and expensive prospect for most people. For example, a 1991 survey on the 1987 Act by Social and Community Planning Research found that the process of seeking remedy through the courts was complex and costly and landlords generally found it easy to evade the Act. A survey of the initial impact on the 1993 Act[8] came to broadly the same conclusion.

So will the introduction of commonhold be different?

We have already seen that the essence of commonhold is that the individual unit holder has the right to retain his unit indefinitely (thereby overcoming the deficiency of leasehold as a wasting asset) and that the unit holders acting collectively (through their interest in the commonhold association) can provide for the effective and proper management of the commonhold development as a whole without the difficulties associated with the enforcement of positive covenants in relation to "flying freehold" and without the often confrontational approach of the traditional landlord and tenant relationship. There is general political consensus on the principle of commonhold and although there may be differences over the detail (as was apparent from the debates during the Committee and Report stages in the House of Lords on the Commonhold and Leasehold Reform Bill), there was clearly a desire to see the legislation introduced. There has been wide consultation with all interested parties whose views have been taken into account in drafting the legislation. Fortunately, the government resisted the temptation to force through the Bill at the end of the last Parliament, a tactic that has been the fatal blow to the efficacy of so much of the previous legislation in the field. However, the eventual introduction of commonhold will finally address some of the issues, which have for so long plagued the residential landlord and tenant world. It may have been a long time in coming, but if the wait produces an effective, well-thought out and well drafted law, then surely it will have been worth it.

However, two words of warning.

First, it should not be seen as the panacea for all residential management problems. Good property management is a time consuming and skilled process and that will continue to apply, regardless of the status of the building. Tenant-owned buildings are becoming increasingly common with the exercise of enfranchisement rights. In many instances, the leasehold system has already been successfully adapted to meet that. However, there are well managed tenant-owned blocks of flats and badly

[8] The Impact of Leasehold Reform; Flat Dweller's Experience of Leasehold Enfranchisement and Lease Renewal, DETR, (1998)

managed tenant-owned blocks of flats and generally speaking the difference between the two has little to do with the form of land tenure and everything to do with the individuals and personalities involved in the building, both principals and advisors. The rules and regulations that will apply to commonhold land will be clearer, more uniform and easier to enforce than leasehold covenants but there will always be a balance to maintain between the interests of the community and the interests of the individual. Communal living means just that and it necessarily involves obligations to others as much as rights for oneself.

There is also perhaps a popular misconception that commonhold will automatically replace the existing leasehold system. It will not. Although the issue has been the subject of considerable debate in the various Consultation Papers and draft Bills, it now seems to be accepted that the consent of all interested parties in a building – both freeholders and leaseholders – must be given to the conversion of a building to commonhold land. That will reduce the number of such conversions and the general view is that commonhold will initially apply mostly to new developments. However, even there I would caution as to how much it may be used in the early stages. If you have recently constructed a new development and are looking to sell the units, would you want to be the "guinea pig" for a new form of land ownership or would you prefer to stick to a system that is known and now largely understood? We shall have to wait to see. In any event, I don't think it matters. It is surely better to introduce the new system slowly to see how well it works in practice before it is adopted more widely. After all, if it works, it will be taken up.

So is commonhold the dawning of a new age? The answer must be that it is, if only for the reason that the introduction of the first new form of land ownership for some 75 years is a very significant event in property law. However, perhaps we can hope that the true legacy of commonhold will be greater than that. If our legislators can learn that ill-thought out piecemeal legislation based on political dogma does not produce good law and are prepared to spend just a little time thinking and consulting, particularly with those who have to live in the world that they create, before rushing to the statute book, then surely that will indeed be the dawning of a new age.

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